

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case Nos. A-6020 and A-6029

APPEAL OF JUDITH AND THOMAS BURRUSS; ALAN GAUNOUX

OPINION OF THE BOARD

(Opinion Adopted: November 10, 2004
(Effective Date of Opinion: March 29, 2005)

Judith and Thomas Burruss and Alan Gaunoux ("Appellants") filed these administrative appeals from building permits (Case no. A-6020) and a sediment control permit (Case no. A-6029) issued by the Montgomery County Department of Permitting Services to John Evans for the construction of 4 190-foot amateur radio towers on his property. The Board consolidated the appeals and granted Mr. Evans' motion to intervene. The Board held a hearing on the appeals on November 10, 2004. Malcolm Spicer, Esquire appeared on behalf of Montgomery County. Steven Van Grack, Esquire appeared on behalf of John Evans. James L. Parsons, Esquire appeared on behalf of the Appellants. Pending before the Board were motions to dismiss filed by the County and Mr. Evans. The Board will grant the motions to dismiss because the building permit appeal is untimely and there is no provision allowing this Board to entertain an appeal from the issuance of a sediment control permit.

FINDINGS OF FACT

The basic facts in this case are undisputed. The Evans' property is located in the RDT (rural density transfer) zone. On February 20, 2004, Mr. Evans received a building permit (no. 330255) to construct four 190-foot amateur radio towers on his property in Poolesville, Maryland.¹ On June 23, 2004, Mr. Evans received a revised building permit (no. 344132) to reflect a change in the guying system and in order to make the towers "rotatable."

¹ Mr. Evans was actually the contract purchaser of the property at the time he obtained the initial building permit. Mr. and Mrs. Evans purchased the property two weeks later, on or about March 5, 2004. Their purchase contract was contingent upon receipt of a permit for the radio towers.

Construction on site began on or about August 5, 2004. Appellants, who were previously unaware of Mr. Evan's building permits, obtained counsel who, in turn, wrote to the County on August 13, 2004, asking that it issue a stop work order. By letter dated August 27, 2004, the County declined to issue a stop work order as to the building permits, although it did note that it had issued a stop work order on site pending final action on Mr. Evans' pending application for a sediment control permit for "a small land disturbance."

On August 30, 2004, the Appellants filed this appeal from the issuance of the building permits.² On September 10, 2004, the County issued Mr. Evans a sediment control permit (no. 213971) and the Appellants noted their appeal from that decision on September 30, 2004.

THE MOTION TO DISMISS THE BUILDING PERMITS APPEAL

The County and Mr. Evans ask the Board to dismiss the appeal from the building permits because it was not filed within 30 days of issuance as required by § 8-23(a).³ They note, quite correctly, that this Board lacks jurisdiction to entertain an untimely appeal. *National Institutes of Health v. Hawk*, 47 Md. App. 189, 422 A.2d 55 (1980), *cert. denied*, 289 Md. 738 (1981).

Appellants argue that Mr. Evans failed to provide the proper notice as required by § 8-25A(a) by conspicuously posting his property.⁴ That section provides:

If a permit is issued under Section 8-25 for **new construction on vacant residentially zoned land or construction that would affect the footprint or height of any existing structure located on residentially zoned land**, the Director must promptly require the recipient to post on the lot a conspicuous sign describing the proposed construction, specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires. The sign must conform to design, content, size, and location requirements set by regulation under Section 8-13(a). (Emphasis added.)

² Appellants also filed a civil action in the Circuit Court for Montgomery County (case no. 254316).

³ Section 8-23(a) provides: "Any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of the Department [of Permitting Services] under this Chapter [Buildings] may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued."

⁴ The building permits state, in bold capital lettering, that they "**Must Be Posted On Job Site**." Although there is nothing in the record, Mr. Evans presumably met this requirement by posting a copy of the building permit at or near the towers. The conspicuous posting requirement of § 8-25A(a), which Appellants would have the Board apply, would require something more.

The Board concludes that Mr. Evans was not required to provide notice under § 8-25A(a). That section is inapplicable because the building permits were not issued for residentially zoned land (*i.e.*, §§ 59-C-1, 59-C-2, 59-C-3), but for land in the RDT zone, an agricultural zone established in § 59-C-9.1. Even if Mr. Evans' property were in a residential zone, this section still would not apply because the permits were not for new construction on vacant land or construction that would affect the footprint or height of an existing structure.⁵ Finally, the allegation that a zoning permit technician may have required one of the Appellants to follow this notice provision when constructing a swimming pool on his property in the RDT zone does not alter the plain meaning of § 8-25A(a).

Neither can Appellants seek refuge in the so-called "discovery rule." That rule is a principle of statutory construction and application, which is employed to determine when a cause of action has accrued within the meaning of that term in a statute of limitations. But this rule has no place in a "time for appeal" provision like § 8-23(a), which is the Board's only basis of jurisdiction in this case. *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 579-80, 650 A.2d 226, 231 (1994).

Appellants next argue that the County's failure to require Mr. Evans to provide them with notice of the building permits violated their due process rights under the Maryland and Federal Constitutions. They cite *Feldman v. Star Homes, Inc.*, 199 Md. 1, 84 A.2d 903 (1951) for the proposition that "one whose property rights are affected by an administrative decision may be entitled to be heard on the subject, and the denial of such right may constitute a lack of due process."⁶ While this statement undoubtedly remains true, it begs the question—was some property right of the Appellants' affected by the issuance of the building permits? Indeed, in *Feldman*, the court concluded that those appellants' property rights were not affected and, accordingly, the city planning commission was not required to provide them notice before passing on a subdivision plan.

Appellants have provided no support for the proposition that they have some constitutionally property right that was affected by the issuance of the

⁵ Appellants also seek to distinguish *Hawk* because that case did not involve a failure to provide notice. Whatever the effect of failing to provide statutory required notice, *compare Baker v. Montgomery County Council*, 241 Md. 178, 215 A.2d 831 (1966) (where zoning ordinance provision mandated notice through posting of property by erection of signs at designated locations, more than substantial compliance is required) with *Beall v. Montgomery County Council*, 240 Md. 77, 212 A.2d 751 (1965) (technical irregularities (here, failure to list all owners of property) in filing of a zoning application not amounting to a jurisdictional defect does not impair the proceeding or affect the validity of the decision), it is clear that notice was **not** required in this case.

⁶ To similar effect is *Rood v. County of Santa Clara*, 6 Cal. Rptr. 3d 746, 113 Cal. App. 4th 549 (2003).

building permits to their neighbor. And in this case, the Board declines to find one.

Appellants cite *Bryniarski, v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967) for the proposition that adjoining, confronting, or nearby property owners are, prima facie, deemed to be persons aggrieved for purposes for appealing a Board decision to the circuit court. (They must also have been a party to the proceeding before the Board.) But this merely establishes the Appellants' right to timely appeal the issuance of the building permits under § 8-23(a); it does not establish any constitutionally protected property interest requiring notice and it does not excuse their untimely appeal.

Finally, Appellants assert that the issuance of the sediment control permit somehow operated as a "renewal" or "re-issuance" of the building permits and, therefore, their appeal is timely. This argument is based upon § 8-26(i)(1) which states that "unless the construction is exempted by Chapter 19, an applicant for a building permit must obtain a sediment control permit before the building permit is issued." In his motion to dismiss, Mr. Evans represents that there was a disagreement among the County inspectors whether he needed to obtain a sediment control permit. On August 14, 2004, Mr. Evans applied for a sediment control permit which he received on September 10, 2004.

The Board does not agree that the sediment control permit operated as a "renewal" or "re-issuance" of the building permits. Assuming Appellants are correct in their reading of § 8-26(i)(1), and that the County erroneously issued the building permits before it issued the sediment control permit, that could have been the basis of an appeal of those building permits. But it does not follow that those permits are void *ab initio*, as Appellants suggest. While the County did issue **a stop work order** and require Mr. Evans to obtain a sediment control permit, it did not **revoke** the underlying building permits or require Mr. Evans to reapply for a new building permit.⁷ See *United Parcel Service, Inc. v. Baltimore County*, 336 Md. 569, 650 A.2d 226 (1994) (zoning commissioner's letter reaffirming earlier issuance of building permits does not give rise to new appeal rights from issuance of building permits).

THE MOTION TO DISMISS THE SEDIMENT CONTROL PERMIT APPEAL

Appellants also seek to challenge Mr. Evans' sediment control permit. But, as this Board has previously stated, the County Code does not provide an appeal from the issuance of a sediment control permit. We readopt the reasoning of our

⁷ Indeed, it is not at all clear that the County issued the stop work order because Mr. Evans failed to obtain a sediment control permit before he obtained his building permits. At oral argument, the County suggested that it initially appeared that Mr. Evans' proposed land disturbance did not meet the threshold for requiring a sediment control permit and that the County later required one when circumstances changes on site.

prior decision on the issue in *Appeal of Joselyn Wells*, Case No. A-5819 (Jan. 30, 2003).

CONCLUSION OF LAW

In conclusion, the appeal from the building permits is untimely and there is no statutory basis for an appeal from the issuance of a sediment control permit. For the foregoing reasons, these appeals are dismissed.

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Donna L. Barron, Wendell M. Holloway and Allison Ishihara Fultz, Chair in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 29th day of March, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

